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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 THE MCBRIDE ORGANIZATION,
8 LLC, a Washington limited liability
company,

9 Plaintiff,

10 v.

11 DOMINIQUE WENGER, an
12 individual; and PHANTOM
ATHLETICS, a foreign entity doing
13 business in the United States,

14 Defendants.

NO: 2:17-CV-231-RMP

ORDER DENYING PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION

15 BEFORE THE COURT is Plaintiff's motion for a preliminary injunction,
16 ECF No. 7. On June 30, 2017, the Court heard oral argument, telephonically, on the
17 motion from Laraine M. I. Burrell, appearing for Plaintiff, and David P. Gardner,
18 appearing for Defendants. Defendant Dominique Wenger also listened to the
19 argument by telephone from Austria. Having considered the parties' filings and oral
20 argument regarding Plaintiff's motion, the remaining record, and the relevant law,
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ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY
INJUNCTION~1

1 the Court denied Plaintiff's motion at the conclusion of the hearing. This Order
2 memorializes that oral ruling.

3 ***Background***

4 Plaintiff sells a product described as Defendant Phantom Athletic's
5 ("Phantom's") Thin Line Training Mask ("PA Mask"), bearing Defendant
6 Phantom's marks, through Plaintiff's own website and the Shopify platform on the
7 internet. Plaintiff also advertises the PA Mask through Facebook and has set up a
8 PayPal account to facilitate sales transactions for the mask. However, the parties
9 dispute whether the masks Plaintiff is selling are manufactured by Phantom or are
10 counterfeit.

11 Phantom is a company based in Salzburg, Austria, owned by Defendant
12 Dominique Wenger. Plaintiff sells PA Masks that Plaintiff alleges are purchased
13 from distributor AliExpress. Plaintiff alleges that Mr. Wenger recently has made
14 various efforts to prevent Plaintiff from selling the PA Mask, including contacting
15 Shopify, PayPal, and Facebook with complaints that Plaintiff is selling counterfeit
16 products. *See* ECF No. 8 at 2-3.

17 Plaintiff filed this action seeking: (1) a declaratory judgment of non-
18 counterfeiting and non-infringement under 28 U.S.C. § 2201(a); (2) preliminary and
19 permanent injunctive relief; and (3) damages based on a claim of federal unfair
20 competition and false designation of origin and false and misleading representations
21 under the Lanham Act, 15 U.S.C. § 1125(a), common law unfair competition,

1 business disparagement, and intentional interference with prospective economic
2 advantage. ECF No. 1. For purposes of the present motion, Plaintiff seeks to enjoin
3 Defendants from pursuing “any complaints of trademark infringement and
4 counterfeiting against the Plaintiff with entities in the United States pending
5 resolution of this action[.]” ECF No. 18 at 4-5. Plaintiff also seeks a preliminary
6 injunction to require non-parties Shopify, Paypal, and Facebook to “reinstate
7 Plaintiff’s accounts pending the resolution of this action.” ECF No. 18 at 5.

8 *Discussion*

9 “[A] preliminary injunction is an extraordinary and drastic remedy, one that
10 should not be granted unless the movant, by a clear showing, carries the burden of
11 persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). To obtain a
12 preliminary injunction, the moving party must demonstrate “that he is likely to
13 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
14 preliminary relief, that the balance of equities tips in his favor, and that an injunction
15 is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20
16 (2008).

17 Provided the Court considers all four parts of the *Winter* test, the Court may
18 supplement its preliminary injunction by considering whether “the likelihood of
19 success is such that ‘serious questions going to the merits were raised and the
20 balance of hardships tips sharply in [plaintiff’s] favor.’” *Alliance for the Wild
21 Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) (quoting *Clear Channel*

1 *Outdoor, Inc. v. City of L.A.*, 340 F.3d 810, 813 (9th Cir. 2003)). Otherwise stated,
2 the “serious questions” consideration survives *Winter*, “so long as the plaintiff also
3 shows that there is a likelihood of irreparable injury and that the injunction is in the
4 public interest.” *Alliance for the Wild Rockies*, 632 F.3d at 1135.

5 Plaintiff did not show a likelihood of any irreparable harm in the absence of a
6 preliminary injunction. Although Plaintiff alleged that the PayPal account was
7 closed as a harm, counsel reported at argument that the account is no longer
8 disabled. There also were representations by Defendant, uncontested by Plaintiff,
9 that Plaintiff’s Shopify and Facebook pages were functional again after access
10 previously had been interrupted.

11 Plaintiff also did not demonstrate any significant or irreparable injury to date.
12 Although counsel conceded that any losses would be quantifiable, counsel did not
13 provide any evidence regarding Plaintiff’s exact losses to date due to Defendant’s
14 alleged actions, or the proportion of Plaintiff’s overall sales that the PA Mask
15 represents. Any future damages may be quantified and presented at trial, if in fact
16 Plaintiff is successful on the merits.

17 The Court further finds that substantial concerns undermine Plaintiff’s
18 likelihood to succeed on the merits. Specifically, Plaintiff’s complaint and motion
19 for preliminary injunction raise questions as to whether jurisdiction is appropriate,
20 whether the appropriate party or parties have been named given the relief that
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1 Plaintiff seeks, and whether Defendants actually are barred from asserting
2 counterclaims, as Plaintiff asserts.

3 Lastly, the Court considers whether the balance of equities tips in favor of
4 Plaintiff and whether an injunction is in the public interest. At the outset of this
5 litigation, Defendants argue that their trademark and business name is being diluted
6 by Plaintiff's selling products with Defendant Phantom's name that are counterfeit.
7 Conversely, Plaintiff argues that it is losing sales and potentially some reputation.
8 With the limited information available to the Court at this moment, the evidence
9 supports Defendants' position and the equities tip toward Defendants rather than
10 Plaintiff. Likewise, the public interest would not be well served by enjoining
11 Defendants from asserting that the safety and/or exercise masks being sold by
12 Plaintiff are not authentic products manufactured by Defendants.

13 Accordingly, **IT IS HEREBY ORDERED** that:

- 14 1. Plaintiff's Motion for a Preliminary Injunction, **ECF No. 7**, is **DENIED**.
15 2. The Court's Courtroom Deputy will set an expedited scheduling
16 conference.

17 The District Court Clerk is directed to enter this Order and provide copies to
18 counsel.

19 **DATED** July 3, 2017.

20 s/ Rosanna Malouf Peterson
21 ROSANNA MALOUF PETERSON
United States District Judge